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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 277

DR. FRANK M. FERRANTE,
Appellant,
against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and DR. RAY E. TRUSSELL, as Chairman and Commissioner of the Board of Hospitals of the City of New York,
Appellees.

MOTION TO DISMISS

Appellees move, pursuant to Rule 16 (1) (b) of the Revised Rules of this Court, to dismiss this appeal on the ground that it does not present a substantial federal question.

The appeal is from the final order and judgment of the New York Court of Appeals which unanimously upheld the constitutionality of the New York City Hospital Code, which was enacted in the year 1964, relating to proprietary hospitals.

The unreported opinion of the New York Supreme Court, New York County, is printed as an appendix to ap-

pellant's Jurisdictional Statement. The unanimous affirmances of the Appellate Division of the Supreme Court, First Department and the Court of Appeals, without opinion, are reported in 24 A D 2d 842, 263 N. Y. S. 2d 680 and 17 N Y 2d 616 respectively.

Question Presented

Are substantial federal questions presented by the promulgation, in 1964, of the New York City Hospital Code relating to proprietary hospitals which bars the practice of major surgery in proprietary hospitals by the plaintiff, Dr. Ferrante, unless he possesses the requisite qualifications set forth in the Code?

Statutes Involved

The New York City Hospital Code pertaining to Proprietary Hospitals is set forth as an appendix to appellant's Jurisdictional Statement.

The Constitution of the State of New York and the New York City Charter, so far as applicable, are set forth as an appendix to appellees' brief.

Statement

The appellant, Dr. Frank M. Ferrante, is one of three plaintiffs. The other plaintiff physicians have not appealed to this Court.

The 1964 New York City Hospital Code provides that major surgery shall be performed in proprietary hospitals only by qualified specialists [§ 15.02 (c)]. Major surgery is defined as "any procedure in which there is considered to be a hazard to life or any procedure in which a major body cavity is opened" [§ 15.02 (n)]. A proprietary hospital is one operated for profit, for the purpose of pro-

viding therein, services and facilities for patients who require diagnosis, treatment and care for illness [§ 11.01 (a)].

Under the Code, a physician may be qualified to practice major surgery or obstetrics in a proprietary hospital if he (1) is a Diplomate of the American Board of Surgery or of Obstetrics and Gynecology, (2) is a Fellow of the American College of Surgery, (3) has completed a residency in surgery or obstetrics and gynecology approved by the American Medical Association, or (4) evidences elgibility for examination by the American Board of Surgery or of Obstetrics and Gynecology [§ 11.01 (L) (1-3) and (M) (1-3)] (19-21).[1] These methods of qualifying are nationally recognized and large numbers of physicians in the City of New York hold such professional recognition (20).

In order to avoid working a hardship on other physicians who, while lacking formal training, have acquired through experience and informal training under supervision, the competence expected of qualified specialists, two additional criteria for qualification were promulgated (20). They are (1) the attainment of the rank of attending or associate attending surgeon or obstetrician in an accredited voluntary (non-profit) or governmental hospital during the five years prior to the adoption of the Code (§ 11.01 (L) (4) and (M) (4) and (2) the attainment of an "S" or specialist rating granted by the Workmen's Compensation Board of the State of New York on the recommendation of the County Medical Society of the City of New York on or after May 1, 1960[2] [§ 11.01, subd. S, last paragraph] (20-21). The Code also contains a hardship clause by which a

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[1] Unless otherwise noted, numbers in parentheses refer to pages of the transcript of record.

[2] Appendix C-1 of Vol. 12 entitled "Labor (C)" of the Official Compilation of Codes, Rules and Regulations of the State of New York contains 29 medical specialties for which a physician may qualify, including General Surgery—Major, (SA) and Gynecology and/or Obstetrics (SL).

physician may seek to become a qualified specialist by action of the Board of Hospitals of the City of New York, on the ground that there are practical difficulties or unnecessary hardships in complying with the enumerated criteria. [§ 1.04 (a)] (21).[3]

Appellant's Jurisdictional Statement (pp. 6-7) fails to mention the attainment of the "S" or specialist rating as one method of qualifying, as well as the presence of a hardship clause in the Code.

The complaint alleges that appellant has performed major surgery for over fifteen years in proprietary hospitals in the City of New York and that he does not possess the qualifications set forth in the 1964 New York City Hospital Code (1-2, 5-6). Appellant urges that those sections of the Code imposing such qualifications are unconstitutional (6).

The complaint fails to allege that Dr. Ferrante has made an effort to become a qualified surgeon or obstetrician by obtaining an "S" rating. Nor does it allege that he has requested the Board of Hospitals to qualify him on the ground of practical difficulty or unnecessary hardship.

Appellees moved, at the Supreme Court, New York County, for summary judgment dismissing the complaint, based upon the affidavit of Ray E. Trussell, Commissioner of Hospitals, as well as numerous exhibits (11-25). Upon the return day, appellant failed to submit any proof to controvert the documentary evidence submitted by appellees. The Court granted the motion and dismissed the complaint.

The uncontroverted documentary proof submitted by appellees, on the original motion, consisting of detailed official studies, medical audits and inspections, established

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[3] The identical qualifications for specialists have recently been imposed by the State of New York on physicians in virtually all hospitals throughout New York State, *infra*, p. 10.

the poor quality of medical care received by patients in proprietary hospitals in New York City. This proof established the fact that unqualified physicians were performing major surgical procedures and that improper and unnecessary surgery was also prevalent. The proof also revealed that serious laboratory deficiencies, which could result in the death of patients, existed in four proprietary hospital laboratories (14-18).

Plaintiffs then attempted to appeal directly to the New York Court of Appeals from the decision of the New York Supreme Court. This appeal was dismissed "upon the ground that there are questions involved other than the constitutionality of a statute. CPLR 5601, Subdiv. b2," 16 N Y 2d 612.

Thereafter, plaintiffs appealed to the Appellate Division, First Department, which Court unanimously affirmed the decision of the Supreme Court, New York County. This judgment was unanimously affirmed on a further appeal to the Court of Appeals of the State of New York.

POINT I

The Provisions of the 1964 Hospital Code of the City of New York, Which Require Additional Qualifications, Beyond Mere Licensure, Before Physicians Can Perform Major Surgery in Proprietary Hospitals, are Constitutional.

(1)

The power of a state to impose reasonably necessary qualifications of learning and skill on those seeking to practice medicine or dentistry is beyond dispute. Such statutes are in no wise violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Dent* v. *West Virginia,* 129 U. S. 114 (1889); *Reetz* v. *Michigan,* 188 U. S. 505 (1903); *Watson* v. *Maryland,* 218 U. S. 173 (1910); *Collins* v. *Texas,* 223 U. S. 288 (1912);

Douglas v. *Noble,* 261 U. S. 165 (1923); *Graves* v. *Minnesota,* 272 U. S. 425 (1926).

This Court has also upheld the power of a state to elevate the standards of skill and learning required of physicians who wish to continue to practice their profession. *Dent* v. *West Virginia, supra; Reetz* v. *Michigan, supra, Collins* v. *Texas, supra.*

It is clear that no physician has a vested constitutional right to continue to practice his profession, without demonstrating the necessary competency. In each of the aforementioned cases, a physician, who had been legally practicing medicine, was prevented, under sanction of criminal penalties, from continuing to practice his profession because of non-compliance with additional standards imposed by the state. Thus, there is no merit to the argument that a physician, who is prevented from undertaking major surgery unless he can demonstrate his competency to protect the health of his patients, is subjected to cruel and unusual punishment or punishment without trial in violation of his rights under the Eighth and Fourteenth Amendments. See also *Gray* v. *Connecticut,* 159 U. S. 74 (1895) and *Semler* v. *Dental Examiners,* 294 U. S. 608 (1935).

(2)

It should be noted that appellant has abandoned the argument, as well as four other constitutional arguments (4, 9), which he had urged in his complaint and in his briefs before all the courts of New York, that the Code bears no reasonable relation to the public health, safety or welfare (Jurisdictional Statement, p. 8).

Inasmuch as the 1964 Hospital Code of the City of New York contains the broadest medically acceptable base under which doctors can qualify as specialists in such specialties as surgery or obstetrics and is clearly reasonably related to the fitness and competency of such specialists, there can be no question as to the relationship of the regulation to the public health, safety and welfare. [§ 11.01 (k)-(t)] [*supra,* p. 3].

(3)

Appellant cannot be heard to complain, since lacking the formal training of a surgeon, he has refused or neglected to make application to his county medical society for an "S" or Specialist rating as a surgeon or obstetrician. *Dent* v. *West Virginia, supra,* at p. 125; *Collins* v. *Texas, supra,* at p. 296; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 616 (1937).

This method of qualification or restriction of a physician's practice, to the rendition of such medical care as his training and experience qualify him, was upheld by the New York Court of Appeals in *Szold* v. *Outlet Embroidery,* 274 N. Y. 271 (1937), 8 N. E. 2d 858. After hearing argument, this Court dismissed the appeal in that case for want of a substantial federal question. *Szold* v. *Outlet Embroidery,* 303 U. S. 623 (1938).

Unlike appellant Ferrante, plaintiff Daly did invoke the provisions of the Code and his specialist rating in general surgery-major was reaffirmed by his County medical society (27-30). Thus the Daly litigation became moot.

(4)

A physician does not have a constitutional right to practice his profession in a hospital. *Hayman* v. *Galveston,* 273 U. S. 414 (1927). It is frivolous to urge this argument and invoke the Ninth Amendment in support thereof (Jurisdictional Statement, pp. 22-23).

No responsible hospital will permit physicians, solely by virtue of licensure, to perform major surgery therein. The fact that a physician has undertaken major surgery over a period of years is no assurance of his competency and does not entitle him, *ipso facto,* to the privilege of performing major surgery in a hospital. *Selden* v. *City of Sterling,* 45 N. E. 2d 329 (App. Ct., 2nd Dist., Illinois, 1942); *Dade County* v. *Trombly,* 102 So. 2d 394 (Dist. Ct. of App., 2nd Dist., Florida, 1958); *Green* v. *City of St. Petersburg,* 17 So. 2d 517 (Sup. Ct., Florida, 1944); *Hamilton County Hospital* v. *Andrews,* 81 N. E. 2d 699 (App.

Ct., Indiana, 1948); also 84 N. E. 2d 469 (Sup. Ct., Indiana, 1949); *Jacobs* v. *Martin,* 90 A. 2d 151 (Superior Ct., New Jersey, 1952).

Selden v. *City of Sterling, supra,* upheld the power of a hospital to place restrictions on the right of a physician to practice major surgery despite the fact that he had been licensed for a period of fifteen years and had performed approximately one hundred and twenty-five major operations. The Court stated at p. 332:

> "* * * A surgeon with only limited experience may be very skillful while one with many years of experience may be a bungler. * * *"

In *Hamilton County Hospital* v. *Andrews, supra,* the Court upheld the rules of a county hospital which required that a physician desiring to practice surgery possess a certificate of internship indicating one year's service as an intern in a hospital approved by the Council of Medical Education and Hospitals of the American Medical Association and three years of surgical training approved by the American College of Surgeons. The Court reached its decision despite the fact that the plaintiff physician had alleged, in his complaint, licensure since 1938, medical service in the armed forces and performance of more than three hundred major operations.

POINT II

The Promulgation of Higher Standards for Those Doctors Performing Major Surgery in Proprietary Hospitals Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(1)

In *Engelsher* v. *Jacobs,* 5 N Y 2d 370 (1959), 157 N. E. 2d 626, cert. den. 360 U. S. 902 (1959), the power of the Board of Hospitals of the City of New York to promulgate a code in 1956 regulating proprietary hospitals was in issue.

In upholding the legality of that code, the Court of Appeals of the State of New York said at p. 374:

> "* * * The New York City Charter authorizes the Board of Hospitals to promulgate the necessary rules and regulations for private proprietary hospitals to promote the public health and welfare (New York City Charter, § 538-a, subd. 2). Thus, we can see that the Legislature itself, in respect to private proprietary hospitals in New York City, has established them in a separate class and has subjected them to special rules and regulations by the Board of Hospitals. * * *"

The manner in which a state permits its subdivisions to protect the health of its citizens is not a federal question. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937); see also Constitution of the State of New York, Article XVII § 3.

Assuming *arguendo* that the sole purpose of enactment of the Code was to eliminate the evils that were found to be present when unqualified physicians performed major surgery on patients in proprietary hospitals, there would be no denial of the Equal Protection clause of the Fourteenth Amendment. There is present no "invidious discrimination" that this Court will strike down, since the record reveals "that the greatest problem with the quality of medical care when comparisons were made between municipal, voluntary [non-profit] and proprietary hospitals, exists in the proprietary hospitals." (16). *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Semler* v. *Dental Examiners*, 294 U. S. 608, 610 (1935); *Watson* v. *Maryland*, 218 U. S. 173, 178, 179 (1910).

Moreover, as shown in the affidavit of Ray E. Trussell, Commissioner of Hospitals of the City of New York, the qualifications of a physician wishing to perform major surgery in proprietary hospitals are less difficult of attainment than those imposed by the Commissioner of Hospitals on doctors in medical schools or non-profit hospitals which

staff the municipal hospital system pursuant to affiliation agreements (21-22).

It should also be noted that the licensing and regulation of non-profit or charitable hospitals are not within the jurisdiction of the Department of Hospitals of the City of New York (New York City Charter § 583-a, subd. a, par. 2). However, the Board of Hospitals, the Interdepartment Health Council and the Comptroller of the City of New York insist that physicians in charitable or non-profit hospitals in New York City, which seek payment from the City of New York for services rendered to indigent patients, possess similar qualifications (The City Record of the City of New York, April 22, 1965, p. 2754).

In any event, appellant's argument is now academic, since the New York State Hospital Review and Planning Council, pursuant to Public Health Law of the State of New York, § 2803, subd. 2, promulgated regulations which impose the identical qualifications for specialists in such specialties as surgery and obstetrics as are found in the 1964 Proprietary Hospital Code.[4] These regulations apply to every charitable, proprietary or governmental hospital in New York State, with the exception of those under the jurisdiction of the Department of Mental Hygiene of the State of New York (Public Health Law, §§ 2800, 2801). New York City is permitted however to impose more restrictive regulations and standards if it so desires (Public Health Law, § 2808).

(2)

Appellant's Jurisdictional Statement contains numerous arguments which are unsupported by a single citation in point. In addition, appellant's reliance on excerpts

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[4] See subdivisions (g), (i) and (r) of § 730.1, subdivision (k) of § 733.1 and § 733.9 of Vol. 10 entitled Health (B) of the Official Compilation of Codes, Rules and Regulations of the State of New York. These have been sent to the Secretary of State of New York, for filing, on July 1, 1966.

from the opinions of this Court, in support of asserted constitutional rights, without regard to the facts in such cases, is a practice frowned upon by this Court. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132-133 (1944); *Hughes* v. *Superior Court*, 339 U. S. 460, 469 (1950); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343-344 (1960).

CONCLUSION

No substantial federal question has been presented by appellant. The appeal should be dismissed.

July 12, 1966

Respectfully submitted,

J. Lee Rankin
Attorney for Appellees

John F. Kelly,
Milton Weinberg,
David Jalosky,
of Counsel

APPENDIX

Constitution of the State of New York
Article XVII—Social Welfare

§ 3. [Public Health]

"The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine."

NEW YORK CITY CHARTER

Chapter 23

Department of Hospitals

Department; Commissioner

§ 581. There shall be a department of hospitals the head of which shall be the commissioner of hospitals.

Board of Hospitals

§ 582-a. a. There shall be in the department a board of hospitals to consist of the commissioner who shall be chairman and ten members, five of whom shall be doctors of medicine possessed of broad medical, public health and hospital background and experience, and five of whom shall be laymen distinguished in community or business affairs.

• • •

Powers and Duties of Commissioner

§ 583. The commissioner shall have all the powers and duties of the department except those vested by law in the board of hospitals.

Jurisdiction of Department

§ 583-a. a. The department shall:

1. Maintain and operate all hospitals, sanatoria, almshouses or other institutions of the city for the care of sick, injured, aged or infirm persons, except as otherwise provided by law, * * *.

2. Visit, inspect and license in the discretion of the commissioner all private proprietary institutions wherein human beings are receiving or may receive medical attention and/or nursing care and/or custodial supervision, including private proprietary hospitals, sanatoria, nursing homes, convalescent homes, homes for the aged or for chronic patients, unless such institutions are non-profit corporations incorporated by special act of the legislature or under the general laws of this state or are maintained or operated by such corporations or are duly licensed under the provisions of the mental hygiene law or of section two thousand five hundred twenty of the public health law. * * * The board of hospitals, nothwithstanding any other provision of law, is hereby authorized to promulgate and include in the hospital code necessary rules and regulations to carry out the purposes of this subdivision to protect the public health and welfare, * * *

* * *

Powers and Duties of the Board of Hospitals

§ 583-b. The board of hospitals shall have the power and duty to:

1. Develop and maintain long range programs of hospital service for the care of sick, injured, aged and infirm persons who are the responsibility of the department.

2. Establish and promote the highest possible standards for the care of sick, injured, aged and infirm persons to be complied with by institutions under the jurisdiction of or

subject to licensing by the department and by institutions which care for any such persons at the expense of the city.

3. Develop, establish and promote standards and methods for increasing the efficiency of operation, maintenance and management of facilities for the care of sick, injured, aged and infirm persons in institutions under the jurisdiction of the department.

• • •

Hospital Code

§ 583-d. a. The board of hospitals is hereby authorized and empowered to promulgate a hospital code and from time to time to add to and to alter, amend or repeal any part of such code. Such hospital code shall consist of such rules and regulations, not inconsistent with the constitution or the laws of this state or with this charter, as may be necessary to carry out the powers and duties vested by law in the department of hospitals and the board of hospitals.

• • •

c. The board of hospitals may embrace in the hospital code all matters and subjects to which the power and authority of the department extends.

d. Any violation of the hospital code shall be a misdemeanor punishable by a fine not to exceed five hundred dollars or by imprisonment for a period not to exceed one year or by both. In addition, any person who shall violate any provision of such code shall be subject to the payment of a penalty of not more than one hundred dollars, to be recovered in a civil action.

• • •